

1-1-2007

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## Recommended Citation

Jessica Sharron, Comment, *Passing the Dream Act: Opportunities for Undocumented Americans*, 47 SANTA CLARA L. REV. 599 (2007).  
Available at: <http://digitalcommons.law.scu.edu/lawreview/vol47/iss3/4>

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# PASSING THE DREAM ACT: OPPORTUNITIES FOR UNDOCUMENTED AMERICANS

Jessica Sharron\*

## I. INTRODUCTION

Meet Danny.<sup>1</sup> Danny came to the United States illegally<sup>2</sup> with his mother when he was only six years old.<sup>3</sup> He attended school for eight years, just as any American youth would.<sup>4</sup> At the age of 14, however, Danny's mother abandoned him, leaving him "to roam the streets of Salt Lake City," and survive on his own.<sup>5</sup> It was then that Danny met Kevin King, and everything changed.<sup>6</sup> Kevin gave Danny a job in his company, and after learning of Danny's desperate situation, invited Danny to live in his home.<sup>7</sup> After a few months, it became clear to Kevin that Danny missed being able to attend school, and with Kevin's help, Danny returned to his studies, and eventually attended the University of

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1. *Unaccompanied Alien Child Protection Act: Hearing Before the Subcomm. On Immigration, Border Security, and Citizenship of the S. Comm. on the Judiciary*, 107th Cong. (2002) [hereinafter *Unaccompanied Alien Child Protection Act*] (statement of Sen. Orrin G. Hatch, Utah), available at [http://judiciary.senate.gov/member\\_statement.cfm?id=172&wit\\_id=51](http://judiciary.senate.gov/member_statement.cfm?id=172&wit_id=51).

2. In this context, "illegally" means that Danny entered the United States without legal documentation in violation of federal law. For the purposes of this comment, the terms "illegal alien," "undocumented alien," "illegal immigrant," or "undocumented immigrant" refer to any person not a citizen or national of the United States who entered the country without legal documentation permitting his or her presence.

3. See *Unaccompanied Alien Child Protection Act*, *supra* note 1.

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

Utah.<sup>8</sup>

Danny's story, however, does not end there.<sup>9</sup> Upon graduation, the divide between Danny and his classmates will become painfully clear.<sup>10</sup> Having entered the United States illegally as a child, Danny is an undocumented immigrant, and despite his years of education, hard work and perseverance, he will lack further opportunities once he graduates from college because federal law makes it illegal for him to work.<sup>11</sup>

Meet Diana.<sup>12</sup> Diana also came to the United States illegally with her parents at the age of six.<sup>13</sup> Diana graduated in the top five percent of her high school class, received numerous academic and community awards, and will be the first in her family to go to college—if she can get there.<sup>14</sup> Diana was accepted into some of the top universities in the country, but was unable to attend them.<sup>15</sup> Since Diana is an undocumented immigrant, she was denied access to financial aid,<sup>16</sup> and thus, cannot afford to enroll.<sup>17</sup> Like Danny, Diana will face the challenge of finding employment after graduation, but for Diana, the obstacles created by her immigration status will present themselves a little bit sooner.

Danny and Diana are not alone; their stories are shared by thousands of others. It is estimated that 5.8 million undocumented immigrants lived in the United States in

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8. *Id.* As of June 20, 2002, Danny was in his third semester of college at the University of Utah. *Id.*

9. *See Unaccompanied Alien Child Protection Act*, *supra* note 1. As of the date of this comment, no additional information is known about Danny and his experiences after Senator Hatch's published statement. This discussion is based not on what Danny has experienced, but what a typical undocumented student in his position would.

10. *See id.*

11. *See id.*

12. U.S. Senator Dick Durbin, *Durbin, Hagel, Lugar: Congress Should Act Now to Help Students Gain Access to Higher Education*, Nov. 21, 2005, <http://durbin.senate.gov/record.cfm?id=249474>.

13. *Id.*

14. *Id.* This information is based on Senator Durbin's statements on November, 21, 2005. *See id.* As of the date of this comment, no additional information is known about Diana and her experiences after the Senator Durbin's published statement of Senator Durbin.

15. *Id.*

16. *See infra* Part II.A.2.a.

17. U.S. Senator Dick Durbin, *supra* note 12.

October 1996.<sup>18</sup> That number jumped to 7 million in January of 2000,<sup>19</sup> and the Pew Hispanic Center (PEW) estimated that in 2004, that figure grew to about 10.3 million.<sup>20</sup> PEW further estimated that 1.6 million of those 10 million were children under the age of eighteen.<sup>21</sup> Sixty-five thousand undocumented immigrants are thought to graduate from high school each year in the United States.<sup>22</sup> Where do they go from there? Federal law does not permit state university systems to provide undocumented immigrants with in-state resident tuition rates, nor does it allow undocumented immigrants access to federal grants, loans, or work-study programs.<sup>23</sup> With these constraints, it is extremely difficult for these students to obtain a higher education. It might be suggested that these students enter the work force instead, but the federal government has made such opportunities even more difficult by forbidding the employment of undocumented immigrants.<sup>24</sup>

Senator Orrin G. Hatch of Utah was inspired by Danny's story,<sup>25</sup> and Senator Dick Durbin of Illinois was moved by Diana's plight.<sup>26</sup> Together, Senator Hatch and Senator Durbin are focused on making a better future for Danny, Diana, and the thousands of others who entered the United States without documentation, and have since become a part of the American culture. In 2001, before the 107th United States Senate, Senator Hatch proposed the Development, Relief, and Education for Alien Minor's Act (DREAM Act), a bill that would provide a path for undocumented students to obtain access to education, employment, and legal status in

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18. IMMIGRATION AND NATURALIZATION SERV., OFFICE OF POLICY AND PLANNING, ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: 1990 TO 2001 1, available at [http://www.dhs.gov/xlibrary/assets/statistics/publications/Ill\\_Report\\_1211.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/Ill_Report_1211.pdf).

19. *Id.*

20. Jeffrey S. Passel, Pew Hispanic Ctr., *Unauthorized Migrants: Numbers and Characteristics*, June 14, 2005, at 3, available at <http://pewhispanic.org/files/reports/46.pdf>.

21. *Id.* at 18.

22. Nat'l Immigration Law Ctr., DREAM Act: Basic Information (Feb. 2007), at [http://www.nilc.org/immlawpolicy/DREAM/dream\\_basic\\_info\\_0406.pdf](http://www.nilc.org/immlawpolicy/DREAM/dream_basic_info_0406.pdf).

23. See *infra* Part II.A.2.

24. 8 U.S.C. § 1324a (2000).

25. *Unaccompanied Alien Child Protection Act*, *supra* note 1.

26. U.S. Senator Dick Durbin, *supra* note 12.

the United States.<sup>27</sup> In 2005, Senator Hatch and Senator Durbin presented the DREAM Act to the United States Senate for the third time.<sup>28</sup> As of April, 2007, the DREAM Act has not passed, and these undocumented youths are left waiting for change.

This comment will discuss the various issues which have prevented the successful adoption of the DREAM Act, and explain the obstacles it faces. Part II will provide a background of the federal and state laws as well as case law that currently govern the education and employment of undocumented immigrants.<sup>29</sup> Part III will address the current state of the DREAM Act and the fact that it has not yet become a law.<sup>30</sup> Part IV will analyze the cases and laws discussed in Part II in light of the opposition to the DREAM Act, focusing on the legal and political reasons why the DREAM Act has failed to pass.<sup>31</sup> Finally, Part V will propose new amendments to the DREAM Act that will facilitate its adoption by Congress and finally allow students like Danny and Diana to realize their American dream.<sup>32</sup>

## II. BACKGROUND

### A. *Educational Opportunities for Undocumented Immigrants*

#### 1. *Plyler v. Doe*

On June 15, 1982, the United States Supreme Court decided *Plyler v. Doe*,<sup>33</sup> holding that a state cannot deny undocumented immigrants access to free public education.<sup>34</sup> *Plyler* was a class action suit that resulted from the consolidation of two district court cases filed in different district courts in Texas,<sup>35</sup> both challenging section 21.031 of

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27. S. 1291, 107th Cong. (2001).

28. S. 2075, 109th Cong. (2005).

29. *See infra* Part II.

30. *See infra* Part III.

31. *See infra* Part IV.

32. *See infra* Part V.

33. *Plyler v. Doe*, 457 U.S. 202 (1982).

34. *Id.* at 230. "If the State is to deny a discrete group of innocent children the free public education that it offers to other children residing within its borders, that denial must be justified by a showing that it furthers some substantial state interest. No such showing was made here." *Id.*

35. *In re Alien Children Education Litigation*, 501 F. Supp. 544, 554-55

the Texas Education Code<sup>36</sup> and its implementing policy.<sup>37</sup>

Prior to 1975, section 21.031 stated, in pertinent part: (1) that all children between the ages of six and eighteen, regardless of their color, were entitled to the benefits of the Available School Fund for that year; (2) that every child in the state between the ages of six and twenty-one was permitted to attend the public free schools of his or her district; and finally, (3) that the board of trustees of any public free school district in Texas was required to admit, free of tuition, all students between six and twenty-one who resided within the district.<sup>38</sup> In 1975, however, Texas enacted an amended version of section 21.031, which changed the unqualified language of "all children" to include only United

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(S.D. Tex. 1980); *Doe v. Plyler*, 458 F. Supp. 569, 571 (E.D. Tex 1978).

36. Section 21.031 of the Texas Education Code stated:

(a) All children who are citizens of the United States or legally admitted aliens and who are over the age of five years and under the age of 21 years on the first day of September of any scholastic year shall be entitled to the benefits of the Available School Fund for that year.

(b) Every child in this state who is a citizen of the United States or a legally admitted alien and who is over the age of five years and not over the age of 21 years on the first day of September of the year in which admission is sought shall be permitted to attend the public free schools of the district in which he resides or in which his parent, guardian, or the person having lawful control of him resides at the time he applies for admission.

(c) The board of trustees of any public free school district of this state shall admit into the public free schools of the district free of tuition all persons who are either citizens of the United States or legally admitted aliens and who are over five and not over 21 years of age at the beginning of the scholastic year if such a person or his parent, guardian or person having lawful control resides within the school district.

*Doe*, 458 F. Supp. at 571.

37. When Tyler I.S.D. noticed the increasing number of undocumented children attending their schools, it implemented the following policy interpreting section 21.031:

The Tyler Independent School District shall enroll all qualified students who are citizens of the United States or legally admitted aliens, and who are residents of this school district, free of tuition charge. Illegal alien children may enroll and attend schools in the Tyler Independent School District by payment of the full tuition fee.

A legally admitted alien is one who has documentation that he or she is legally in the United States, or a person who is in the process of securing documentation from the United States Immigration Service, and the Service will state that the person is being processed and will be admitted with proper documentation.

*Id.* at 572; see also *In re Alien Children*, 501 F. Supp. at 554-55.

38. *Doe*, 458 F. Supp. at 572 n.3.

States citizens or legally admitted aliens.<sup>39</sup> This change essentially removed undocumented children from the class of students entitled to school funds and free public education.<sup>40</sup> Two years later, in 1977, the Board of Trustees of Tyler Independent School District (School District) adopted a policy to implement the amended statute stating that all qualified students who were U.S. citizens or legal residents could attend school free of charge, but that illegal alien children were required to pay tuition.<sup>41</sup> In accordance with this new policy, the School District refused to admit undocumented students into public schools unless they paid an annual tuition of \$1,000.<sup>42</sup> As a result, a group of Mexican children unable to prove their legal status in the United States challenged the constitutionality of the statute by filing suit in the United States District Court for the Eastern District of Texas.<sup>43</sup>

The district court, in *Doe v. Plyler*, held section 21.031 unconstitutional under the Equal Protection Clause of the Fourteenth Amendment<sup>44</sup> and based upon the on account of the principle of federal preemption of state law.<sup>45</sup> First, the court found that illegal aliens are entitled to protection under the Equal Protection clause because they fell within U.S. jurisdiction when they entered the United States.<sup>46</sup> While

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39. See *id.* at 571. The amended version of section 21.031 changed the wording "all children," "every child," and "all persons," to "all children who are citizens of the United States or legally admitted aliens," "[e]very child in this state who is a citizen of the United States or a legally admitted alien," and "all persons who are either citizens of the United States or legally admitted aliens." *Id.*

40. See *id.* at 571-72.

41. *Id.* Although section 21.031 was enacted in 1975, the Tyler I.S.D. continued to admit undocumented children free of charge. *Id.* In 1977, however, the district observed an increasing number of such children. *Id.* Believing that they were creating a "haven" for undocumented immigrants, the Board of Trustees began enforcing the amended statute. *Id.*

42. *Id.* at 571.

43. *Id.* at 569.

44. Per the U.S. Constitution:

No State shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

45. See *Doe*, 458 F. Supp. at 579-80, 590-92.

46. *Id.* at 579 (citing *Bolanos v. Kiley*, 509 F.2d 1023). "While due process is

recognizing that equal protection is a fundamental right, but noting that undocumented persons may not be entitled to the same degree of protection as legal residents and U.S. citizens, the court considered which level of scrutiny was most appropriate to determine whether the state's infringement of the plaintiffs' rights was constitutional.<sup>47</sup> Ultimately, the court decided to apply a rational basis test,<sup>48</sup> "which require[d] only that the State's system be shown to bear some rational relationship to legitimate state purposes."<sup>49</sup> The state first argued that one "legitimate purpose" was the allocation of limited educational revenues.<sup>50</sup> With limited funds, the state reasoned that such money should be used to educate U.S. citizens and legal residents instead of illegal aliens.<sup>51</sup> The court rejected this argument, holding that saving money was not a sufficient justification, and deemed equally unconvincing the state's position that the illegality of the children's presence in the United States was itself a legitimate interest.<sup>52</sup> Finding that section 21.031 failed to serve a legitimate purpose, the court held that there was no rational basis for the School District's policy of exclusion

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afforded to 'any person,' equal protection extends only to 'any person within [a state's] jurisdiction' . . . . People who have entered the United States, by whatever means, are 'within its jurisdiction' in that they are within the territory of the United States and subject to its laws." *Id.* (citing U.S CONST. amend. XIV, § 1).

47. *Id.* at 580.

48. In determining which standard of scrutiny to apply, the district court examined four factors. First, the court looked to the benefit denied, education. *Id.* at 580-81. The court held that strict scrutiny did not apply because although access to education was made more difficult, it was not barred entirely. *Id.* at 581. Secondly, the court noted that strict scrutiny may be appropriate when there is discrimination on the basis of wealth. *Id.* at 581-82. Third, the district court explored the possibility that higher scrutiny may be required when, as in this case, the injured children were not in a position to prevent the illegal acts of their parents. *Id.* at 582. Finally, the court examined the argument that strict scrutiny was necessary because illegal aliens were a suspect class. *Id.* at 582-83. The court rejected the application of strict scrutiny to these four scenarios, and held that a rational basis standard was appropriate in this case. *Id.* at 583-85.

49. *Id.* at 580 (citing *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 40 (1973)).

50. *Id.* at 585.

51. *Doe*, 458 F. Supp. at 585. "Defendants attempted by their proof at trial to rationalize this decision by cataloguing a number of characteristics and special educational needs that make illegal alien children especially burdensome to educate." *Id.*

52. *Id.* at 586.



under section 21.031.<sup>53</sup>

On the issue of preemption, the district court looked to the question of whether the Texas statute and policy infringed upon an area preempted by federal law.<sup>54</sup> The court held that section 21.031 was inconsistent with federal law and was therefore abrogated by the Supremacy Clause<sup>55</sup> because "there [was] no indication that Congress in any way intended to impose on Illegal entrants the kind of penalty devised by [the] defendants here,"<sup>56</sup> and "federal laws consistently demonstrate[d] a strong congressional commitment to education, in particular the education of disadvantaged children."<sup>57</sup> Whereas section 21.031 was directed at illegal aliens who were settled in the United States, the court found that the federal immigration scheme reflected Congress' intent to confront issues of illegal immigration at the source by destroying the incentive to enter the United States.<sup>58</sup> Furthermore, section 21.031 attempted to deny certain children access to education, whereas past federal legislation sought to achieve the opposite result by, for example, providing funds to support educational agencies serving low-income families and requiring bilingual education programs.<sup>59</sup> Based on this reasoning, the district court enjoined the School District from denying free public education to any child solely on the basis of their illegal

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53. *Id.* at 585-90.

Neither has the state articulated the discrete considerations relating to the status of the class excluded by section 21.031 that make it reasonable for the state to refuse to educate its members. On the contrary, all of the arguments advanced by the state to justify its decision to exclude illegal aliens, as opposed to any other group, are either underinclusive or overinclusive, so as to belie any truly rational connection between the ends sought and the means employed.

*Id.* at 588.

54. *Id.* at 590.

55. The Supremacy Clause of the U.S. Constitution states:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, §1, cl. 2.

56. *Doe*, 458 F. Supp. at 591.

57. *Id.*

58. *Id.* at 591.

59. *See id.* (citing 20 U.S.C. §§ 241a, 1703).

status.<sup>60</sup>

From 1978 to 1979, five additional complaints filed in the Southern and Western Districts of Texas challenged section 21.031.<sup>61</sup> The United States intervened and the District Court for the Southern District of Texas consolidated the claims in *In re Alien Children Education Litigation*.<sup>62</sup> In evaluating the state's interest in excluding undocumented immigrants from public schools,<sup>63</sup> the court applied a strict scrutiny test, as opposed to the less rigorous rational basis test applied in *Doe v. Plyler*.<sup>64</sup> Whereas the rational basis test required the state to show a rational relationship to a legitimate state interest,<sup>65</sup> under the strict scrutiny standard, the state was required to meet the higher burden of showing that the statute was necessary to promote a compelling governmental interest, that the unequal treatment was not capricious or irrelevant, and that there were no less restrictive alternatives.<sup>66</sup> The court held that the classification of illegal aliens as an excluded group under section 21.031 did not further a compelling state interest, and that it was therefore unconstitutional under the Equal Protection Clause of the Fourteenth Amendment.<sup>67</sup> However,

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60. *Id.* at 593.

61. *In re Alien Children Education Litigation*, 501 F. Supp. 544, 550 (1980).

62. *Id.* at 550-51.

63. *Id.* at 574. The court articulated the three expressed interests of the state in enforcing the Texas education statute as: (1) the number of undocumented children in Texas; (2) the financial impact of educating these children on state and local resources; and (3) the impact of educating undocumented children on the quality of education and on compliance with desegregation orders. *Id.* at 574.

64. *Id.* at 564.

In summation, the court concludes that the strict judicial scrutiny should be applied to determine whether the statute violated the equal protection clause. The bases for this conclusion are the following: the statute absolutely deprives undocumented children of access to education thereby causing them great harm; there is a direct and substantial relationship between education and the explicitly guaranteed right to exchange ideas and information; and, the provision of education is not a social or economic policy but a state function. Additionally, recognizing the right to access to education when it is being provided to others does not imply a right to equal enjoyment of education.

*Id.*

65. *Doe*, 458 F. Supp. at 580 (citing *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 40 (1973)).

66. *See id.* at 115-16 (internal citations omitted).

67. *Id.* at 583-84.

in contrast with the Eastern District of Texas' decision in *Doe v. Plyler*, the Southern District of Texas determined that federal law did not preempt section 21.031.<sup>68</sup>

On appeal, the Court of Appeals for the Fifth Circuit affirmed the rulings of both the Eastern and Southern Districts on the issue of equal protection, but overruled the Eastern District with regard to preemption, finding that section 21.031 was preempted by federal law.<sup>69</sup> The United States Supreme Court noted probable jurisdiction over both cases<sup>70</sup> and consolidated them into one action.<sup>71</sup>

The Court first addressed the question of whether undocumented immigrants enjoy the benefit of the Equal Protection Clause of the Fourteenth Amendment.<sup>72</sup> Drawing support from the text of the Constitution, the Court determined that the protection of the Fourteenth Amendment was not limited to United States citizens, but extended to "all persons within the territorial jurisdiction, without regards to any differences of race, of color, or of nationality . . . ."<sup>73</sup> Thus, the states were required to afford a person the equal protection of their laws regardless of whether that person entered the country illegally.<sup>74</sup>

Next, the Court considered the appropriate level of scrutiny with which to evaluate the constitutionality of section 21.031 in light of its determination that the Fourteenth Amendment protected undocumented immigrants.<sup>75</sup> Faced with this same question, the Eastern District of Texas applied a rational basis test, while the Southern District of Texas relied on strict scrutiny.<sup>76</sup> According to the Supreme Court, strict scrutiny applied when a law sought to disadvantage a "suspect class" or impinged upon a fundamental right.<sup>77</sup> As applied to the plaintiffs in

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68. *Id.* at 588.

69. *Plyler v. Doe*, 457 U.S. 202, 208-09 (1982).

70. *Plyler v. Doe*, 451 U.S. 968 (1981); *Texas v. Certain Named and Unnamed Undocumented Alien Children*, 452 U.S. 957 (1981).

71. *Plyler*, 457 U.S. at 210.

72. *Id.* at 210-15.

73. *Id.* at 212 (citing *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886)).

74. *Id.* at 215.

75. *Id.* at 216-24.

76. *In re Alien Children Education Litigation*, 501 F. Supp. 544, 564 (1980) (applying strict scrutiny); *Doe v. Plyler*, 458 F. Supp. 569, 580-85 (1978) (applying the rational basis test).

77. *Plyler*, 457 U.S. at 216-17.

*Plyler*, the Court found that illegal aliens were not a suspect class, and that access to education is not a fundamental right, thereby abrogating the application of strict scrutiny.<sup>78</sup>

Although the Supreme Court rejected the Southern District's application of strict scrutiny, it also declined to follow the Eastern District's use of the rational basis test.<sup>79</sup> Instead, the Court applied a standard of review falling somewhere in between—an intermediate level of scrutiny.<sup>80</sup> The Court arrived at this determination by classifying the plaintiff children not as a suspect class, but as their own special subclass.<sup>81</sup> Even though the children's entry into the United States was illegal, the Court noted that their illegal entry resulted from the acts of their parents, which the children could not control.<sup>82</sup> The Court classified these children as separate from the broad class of illegal aliens, and importantly, separate and distinct from their parents.<sup>83</sup> Further, the Court noted that the right to public education, though not fundamental, was more significant than other social benefits.<sup>84</sup> Therefore, *Plyler* did not present a situation where a suspect class was deprived of a fundamental right, but a matter in which a discrete class was deprived of a significant right.<sup>85</sup> The Court deemed the inability of undocumented children to get an education a "lifetime hardship on a discrete class of children not accountable for their disabling status."<sup>86</sup> Taking into account the statute's significant cost to the children and to the United States, and considering whether the statute "further[ed] some substantial goal,"<sup>87</sup> the Court held that section 21.031 was unconstitutional.<sup>88</sup>

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78. See *id.* at 223.

79. See *id.* at 223-24.

80. Jessica Salsbury, Comment, *Evading "Residence": Undocumented Students, Higher Education, and the States*, 53 AM. U.L. REV. 459, 466 (2003).

81. The Court in *Plyler* referred to the plaintiffs as members of an "underclass" and as a "discrete class of children." *Plyler*, 457 U.S. at 219, 223.

82. *Id.* at 220 (citing *Trimble v. Gordon*, 430 U.S. 762, 770 (1977)).

83. *Id.*

84. *Id.* at 223.

85. See *id.* at 218-20, 221-23.

86. *Id.* at 223.

87. See *Plyler*, 457 U.S. at 224.

88. *Id.* at 228-30.

## 2. Federal Legislation

*Plyler* made it unconstitutional to deny undocumented immigrants access to free public education,<sup>89</sup> but educational accessibility is significantly lessened after high school. The holding of *Plyler* only addressed the availability of free public education through the twelfth grade, leaving the question of post-secondary education unsettled.<sup>90</sup> There is no case law that prohibits undocumented aliens from attending public colleges or universities,<sup>91</sup> nor any federal or state law that bars them from higher education.<sup>92</sup> Nonetheless, federal and state governments have addressed the issues of financial aid and tuition rates for illegal immigrants, and have taken action to regulate their attendance without expressly denying them access entirely.<sup>93</sup>

### a. *Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA)*

In 1996, Congress enacted PRWORA<sup>94</sup> which restricts immigrants' eligibility for federal, state, and local public benefits.<sup>95</sup> As defined by PRWORA, such benefits include "post-secondary education . . . or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit. . . ."<sup>96</sup> PRWORA, however, focuses solely on monetary assistance to immigrants and does not address the question of access to post-secondary education.<sup>97</sup>

In determining who is eligible to receive public benefits, PRWORA classifies a person as either a qualified or a non-qualified alien.<sup>98</sup> A qualified alien is essentially one who has

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89. *Id.* at 230.

90. *See id.*

91. Ellen Badger & Stephen Yale-Loehr, *Myths & Realities for Undocumented Students Attending U.S. Colleges and Universities*, 174 J.C. ADMISSION 10 (2002), available at [http://www.findarticles.com/p/articles/mi\\_qa3955/is\\_200201/ai\\_n9050021](http://www.findarticles.com/p/articles/mi_qa3955/is_200201/ai_n9050021).

92. *Id.*

93. *See infra* Part II.A.2.

94. 8 U.S.C. §§ 1601-1646 (2000).

95. *Id.*

96. *Id.* § 1611(c)(1)(B) (addressing federal benefits); *Id.* § 1621(c)(1)(B) (addressing state and local benefits).

97. *See* Equal Access Educ. v. Merten, 305 F. Supp. 585, 605 (2004).

98. 8 U.S.C. § 1601.

some government-approved reason for being present in the United States.<sup>99</sup> Under PRWORA, an individual who is not a qualified alien is ineligible for any federal public benefit,<sup>100</sup> or any state or local benefit, with one notable exception.<sup>101</sup> PRWORA recognizes a state's power to determine eligibility for its own public benefits.<sup>102</sup> As such, states have the power to award public benefits to an "unqualified" individual by enacting a law that affirmatively grants such eligibility.<sup>103</sup> The students at issue in *Plyler*, therefore, would not have been considered "qualified" aliens for the purposes of PRWORA, and further, would have been ineligible for any post-secondary financial assistance, unless otherwise provided for by the state.

*b. Illegal Immigration Reform and Immigrant  
Responsibility Act of 1996 (IIRIRA)*

Like PRWORA, IIRIRA<sup>104</sup> regulates higher education benefits to undocumented aliens without expressly denying undocumented immigrants admission to a college or university.<sup>105</sup> Though both laws speak to the issue of

99. *See id.* § 1641.

(b) Qualified alien. For purposes of this title, the term "qualified alien" means an alien who, at the time the alien applies for, receives, or attempts to receive a Federal public benefit, is—

(1) an alien who is lawfully admitted for permanent residence under the Immigration and Nationality Act,

(2) an alien who is granted asylum under section 208 of such Act,

(3) a refugee who is admitted to the United States under section 207 of such Act,

(4) an alien who is paroled into the United States under section 212(d)(5) of such Act for a period of at least 1 year,

(5) an alien whose deportation is being withheld under section 243(h) of such Act (as in effect immediately before the effective date of section 307 of division C of Public Law 104-208) or section 241(b)(3) of such Act (as amended by section 305(a) of division C of Public Law 104-208),

(6) an alien who is granted conditional entry pursuant to section 203(a)(7) of such Act as in effect prior to April 1, 1980; or

(7) an alien who is a Cuban and Haitian entrant (as defined in section 501(e) of the Refugee Education Assistance Act of 1980).

*Id.* § 1641(b).

100. *Id.* § 1611.

101. *Id.* § 1621.

102. *Id.*

103. *Id.*

104. 8 U.S.C. § 1623.

105. *See id.*

"benefits," PRWORA broadly governs monetary assistance to illegal aliens for post-secondary education, while IIRIRA specifically addresses the question of in-state tuition.<sup>106</sup> Section 505 of IIRIRA<sup>107</sup> states that an illegal alien is ineligible for post-secondary education benefits based on residence, unless a citizen or national of the United States is also eligible for that benefit, regardless of his or her residence.<sup>108</sup> In other words, if an institution of post-secondary education grants an illegal student in-state tuition, it must also offer that rate to all citizens and nationals of the United States, even if they live out-of-state. Schools that charge an undocumented student in-state tuition, therefore, forfeit the additional financial support that out-of-state tuition provides.

The difference between in-state and out-of-state tuition is significant, both to the student in terms of affordability, and to the school in terms of cash flow into its coffers. For example, in the 2006-2007 school year, the annual cost of tuition and fees at the University of California, Los Angeles (UCLA) for an undergraduate, in-state resident was \$7,143.23.<sup>109</sup> The rate for an undergraduate, out-of-state resident jumps to \$25,827.23, a difference of \$18,684.<sup>110</sup> The annual cost of tuition and fees for the same period at the University of Virginia (UVA) for an undergraduate, in-state resident was \$8,035.00, while the out-of-state resident rate increased to \$26,135.00, a difference of \$18,100.<sup>111</sup> The average income of an undocumented immigrant family in 2003 was estimated to be \$27,400,<sup>112</sup> just over the annual rate for an out-of-state student at UCLA and UVA. Thus, to fully support one student at UCLA or UVA, the average undocumented family would have to use nearly the entirety of

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106. Andrew Stevenson, Note, *Dreaming of an Equal Future for Immigrant Children: Federal and State Initiatives to Improve Undocumented Students' Access to Postsecondary Education*, 46 ARIZ. L. REV. 551, 569 (2004).

107. *Id.* at 555.

108. 8 U.S.C. § 1623.

109. Univ. of Cal. Los Angeles Registrar's Office, Fees: Graduate and Undergraduate 2006-2007 Annual, <http://www.registrar.ucla.edu/fees/gradfee.htm> (last visited Apr. 4, 2007).

110. *Id.*

111. Univ. of VA Facts at a Glance, Tuition and Fees: Cost of Undergraduate Education 2006-2007, [http://www.virginia.edu/Facts/Glance\\_Tuition.html](http://www.virginia.edu/Facts/Glance_Tuition.html) (last visited May 7, 2007).

112. See Passel, *supra* note 20, at 30.

its income. Therefore, the average undocumented student will need financial assistance in order to attend college.

PRWORA and IIRIRA account for over two-thirds of all financial aid to all college students in the United States.<sup>113</sup> In denying financial assistance to undocumented students, PRWORA and IIRIRA present significant barriers to higher education.<sup>114</sup> According to Congress, this was the aim of the laws—the House Conference Report on IIRIRA states that Congress intended to make undocumented immigrants ineligible for in-state tuition rates.<sup>115</sup>

### 3. State Legislation

Despite Congress's attempt to prevent undocumented immigrants from enjoying the benefit of in-state tuition rates through IIRIRA, this phenomenon has not occurred in practice. Nine states have passed laws which allow undocumented immigrants to pay in-state tuition rates,<sup>116</sup> and thirty states have considered similar legislation.<sup>117</sup> On the other side of the spectrum, six states have tried to enact laws expressly restricting undocumented students from paying in-state tuition rates,<sup>118</sup> but have been unsuccessful thus far.<sup>119</sup>

Texas was the first state to pass legislation that afforded undocumented students in-state tuition rates. On June 16,

113. Stevenson, *supra* note 106, at 569.

114. *Id.*

115. Jennifer L. Maki, Note, *The Three R's: Reading, 'Riting, and Rewarding Illegal Immigrants: How Higher Education Has Acquiesced in the Illegal Presence of Undocumented Aliens in the United States*, 13 WM. & MARY BILL RTS. J. 1341, 1352 (2005) (citing H.R. Conf. Rep. No. 104-828, at 240 (1996)).

116. Carl Krueger, *In-State Tuition for Undocumented Immigrants*, STATE NOTES (Educ. Comm'n of the States 2006), <http://www.ecs.org/clearinghouse/61/00/6100.htm>.

The nine states that have passes laws are: California, Illinois, Kansas, New Mexico, New York, Oklahoma, Texas, Utah, and Washington. *Id.*

117. *Id.* The thirty states that have considered legislation are: Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Kansas, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Oregon, Rhode Island, Texas, Utah, Virginia, Washington, and Wisconsin. *Id.*

118. *Id.* The six states that have tried to pass laws to restrict in-state tuition rates to undocumented immigrants are : Alaska, Arizona, Colorado, North Carolina, Utah, and Virginia. *Id.*

119. *Id.*



2001, Texas Governor Rick Perry signed House Bill (H.B.) 1403, later codified as section 54.052(j) of the Texas Education Code,<sup>120</sup> which provided that a student was exempt from non-resident tuition if that student: (1) resided with his or her parent, guardian, or conservator while attending a Texas high school; (2) graduated from high school or attained the equivalent of a high school diploma in the state of Texas; (3) resided in Texas for at least three years prior to high school graduation or receipt of an equivalent diploma; (4) registered as an entering student at an institution of higher education not earlier than the fall 2001; and (5) filed an affidavit with the institution of higher education stating that he or she will apply for legal status as soon as he or she is able to do so.<sup>121</sup> In 2005, the Texas Legislature reconsidered the tuition issue in Senate Bill (S.B.) 1528, and revised section 54.052 to make the residency requirements essentially uniform for all students, regardless of their residency status.<sup>122</sup> Section 54.052 now dictates the determination of a student's residency status based on years lived in the state and high school attendance, regardless of citizenship or legal status.<sup>123</sup> Like its predecessor, however, S.B. 1528 maintained the requirement that students who are neither citizens nor permanent residents must submit an affidavit stating that they will apply to become a permanent resident of the United States as soon as they are eligible.<sup>124</sup>

California was not far behind Texas. On October 12, 2001, California Governor Gray Davis signed California Assembly Bill (Cal. A.B.) 540,<sup>125</sup> codified as section 68130.5 of the California Education Code.<sup>126</sup> Cal. A.B. 540 set forth essentially identical requirements to Texas H.B. 1403 with regard to tuition rates at California's public universities and

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120. TEX. EDUC. CODE § 54.052(j) (Vernon 2002). This statute was amended in 2005, based on Texas Senate Bill 1528. CAROLE KEETON STRAYHORN, TEX. COMPTROLLER OF PUB. ACCOUNTS, SPECIAL REPORT: UNDOCUMENTED IMMIGRANTS IN TEXAS: A FINANCIAL ANALYSIS OF THE IMPACT TO THE STATE BUDGET AND ECONOMY 3-5 (Tex. Office of the Comptroller 2006), available at <http://www.cpa.state.tx.us/specialrpt/undocumented/undocumented.pdf>.

121. TEX. EDUC. CODE § 54.052(j).

122. STRAYHORN, *supra* note 120, at 4.

123. See TEX. EDUC. CODE. § 54.052.

124. TEX. EDUC. CODE § 54.053(3)(B) (Vernon 2006).

125. A.B. 540, 2001-2002 Assem., Reg. Sess. (Cal. 2001).

126. CAL. EDUC. CODE § 68130.5 (West 2002).

colleges.<sup>127</sup> Between 2002 and 2005, Utah, New York, Washington, Illinois, Oklahoma, Kansas, and New Mexico followed suit with similar legislation.<sup>128</sup>

The constitutionality of these statutes remains in question. Proponents believe that such legislation complies with IIRIRA because IIRIRA focuses on residency requirements, while these laws generally focus on where the student graduated from high school.<sup>129</sup> The opposition, however, contends that IIRIRA bars such legislation by prohibiting a state from offering in-state tuition rates to undocumented immigrants unless the same advantage is extended to all United States citizens, regardless of where they reside.<sup>130</sup> Jean Oswald, the executive director of the New Jersey Commission on Higher Education<sup>131</sup> explained, "We just don't know how [this debate is] going to play out . . . . We've been waiting to see what has happened in other states with similar laws. What if one is challenged?"<sup>132</sup>

The Supreme Court has not yet ruled on whether these state statutes conflict with IIRIRA, but recent litigation may present the opportunity. On July 19, 2004, a group of six parents and eighteen students filed a lawsuit, *Day v. Sebelius*, in the United States District Court for the District of Kansas challenging section 76-731a of the Kansas Statutes,<sup>133</sup> a law which grants in-state tuition rates to undocumented immigrants.<sup>134</sup> The plaintiffs are United States citizens who attend various Kansas universities and have been classified as non-residents for tuition purposes.<sup>135</sup> The complaint objects to the ability of undocumented immigrants to receive in-state tuition rates and challenges the constitutionality of section 76-731a on the grounds that it

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127. See *id.*; A.B. 540, 2001-2002 Assem. Reg. Sess. (Cal. 2001).

128. Krueger, *supra* note 116.

129. Thomas R. Ruge and Angela D. Inza, Article, *Higher Education for Undocumented Students: The Case for Open Admission and In-State Tuition Rates for Students Without Lawful Status*, 15 IND. INT'L & COMP. L. REV. 257, 270 (2005).

130. *Id.* at 272.

131. Susan Donaldson James, *For Illegal Immigrants, a Harsh Lesson*, N.Y. TIMES, June 19, 2005, § 14NJ (N.J. Weekly Desk), at 1.

132. *Id.*

133. *Day v. Sebelius*, 376 F. Supp. 2d 1022, 1025 (2005).

134. KAN. STAT. ANN. § 76-731a (2006).

135. *Day*, 376 F. Supp. 2d at 1025.

violates federal law, including PWORA and IIRIRA.<sup>136</sup> Although specifically addressing Kansas's statute, *Day* has implications for all nine states with laws that grant in-state tuition rates to undocumented immigrants. "It is perceived, accurately, as a test case . . . [i]t's the first test in federal court of whether these laws can stand."<sup>137</sup>

*Day* has yet to be tried on its merits.<sup>138</sup> The District Court of Kansas has ruled on various pretrial motions.<sup>139</sup> On July 5, 2005, the district court granted summary judgment on behalf of the defendants and intervenors, dismissed counts one and three through seven due to plaintiffs' lack of standing, dismissed count two because 8 U.S.C. § 1623 does not afford plaintiffs a private right of action, and dismissed Governor Kathleen Sebelius as a party to the action.<sup>140</sup>

On December 12, 2005, another group of college students filed a suit challenging the California law that grants in-state tuition rates to undocumented immigrants.<sup>141</sup> As in *Day*, the plaintiffs oppose the awarding of in-state tuition benefits to undocumented immigrants, contending that such a law discriminates against out-of-state students who are United States citizens.<sup>142</sup> With these suits pending, states remain unclear as to whether federal law precludes their ability to grant in-state tuition rates to undocumented aliens.

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136. *Id.* at 1026-28. Plaintiffs alleged five counts of violations federal law: count one alleges that "K.S.A 76-731a violates 8 U.S.C. § 1621 [PRWORA]"; count two contends that "K.S.A 76-731a violates 8 U.S.C. § 1623 [IIRIRA]"; count three claims that "K.S.A. 76-731a violates the comprehensive regulatory scheme enacted by the federal government to govern the admission of nonimmigrant aliens to the United States for the purpose of enrolling them as students at post-secondary educational institutions"; count four alleges that "K.S.A 76-731a is preempted by the federal regulation of immigration"; count five contends that "K.S.A 76-731a creates residence status for illegal aliens contrary to federal law"; count six states that "K.S.A 76-731a impermissibly infringes on Constitutional powers reserved to the federal government"; and count seven contends that "K.S.A 76-731a violates the Equal Protection Clause of the United States Constitution." *Id.* at 1026-29.

137. John Hanna, *Kansas' Immigrant Tuition Law Challenged*, ASSOCIATED PRESS, May 11, 2005, available at <http://www.phillyburbs.com/pb-dyn/news/278-05112005-487842.html> (quoting Kris Kobach, the attorney for the plaintiffs in *Day v. Sebelius*).

138. As of May 2007, *Day* has not been tried on the merits.

139. *Day*, 376 F. Supp. 2d at 1040.

140. *Id.*

141. *Id.*

142. *Id.*

*B. Employment Opportunities for Undocumented Immigrants*

The challenges faced by undocumented immigrants extend beyond access to education. U.S. citizens and legal residents have the opportunity to put their education to use by seeking employment after graduation from high school or college. However, for undocumented immigrants, the security of *Plyler* does not extend beyond high school graduation, and affords them no protection and no guarantees in the “real world.”

In an attempt to address the growing population of illegal immigrants in the workforce, Congress enacted the Immigration Reform and Control Act of 1986 (IRCA).<sup>143</sup> Section 1324a of IRCA states:

It is unlawful for a person or other entity . . . to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien . . . with respect to such employment . . . . [and i]t is unlawful for a person or other entity, after hiring an alien for employment in accordance with paragraph (1), to continue to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment.<sup>144</sup>

The statute further states that any person who violates these provisions risks penalties of up to a \$3,000 fine for each undocumented immigrant involved, imprisonment for up to six months, or both.<sup>145</sup> In addition, section 1324b of IRCA expressly exempts undocumented immigrants from protection against discrimination in hiring and firing practices.<sup>146</sup> On a larger scale, a person who knowingly hires at least ten undocumented immigrants will be fined and/or imprisoned for up to five years.<sup>147</sup>

Despite such federal legislation, undocumented immigrants remain a part of the workforce. However, their opportunities are substantially limited when compared to

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143. Mariel Martinez, Comment, *The Hoffman Aftermath: Analyzing the Plight of the Undocumented Worker Through a Wider Lens*, 7 U. PA. J. LAB. & EMP. L. 661, 666 (2005).

144. 8 U.S.C. §§ 1324a(a)(1)(A), (a)(2) (2000).

145. *Id.* § 1324a(f).

146. *Id.* § 1324b.

147. *Id.* § 1324a(f).

those of U.S. citizens.

[U]nauthorized migrants are much more likely to be in broad occupation groups that require little education or do not have licensing requirements. The share of unauthorized who work in agricultural occupations and construction and extractive occupations is about three times the share of native workers in these types of jobs.<sup>148</sup>

The incomes of undocumented immigrants are notably lower than those of U.S. citizens and legal residents.<sup>149</sup> A 2004 study revealed that the average income of an undocumented immigrant family is more than forty percent below the average income of families comprised of either legal immigrants or United States citizens.<sup>150</sup>

Although undocumented workers are not legally permitted to work in the United States, the federal government does afford those who can find jobs some protection against unfair treatment in the workplace. The extent of this protection, however, remains an unsettled question.<sup>151</sup> In 1935, Congress passed the National Labor Relations Act (NLRA),<sup>152</sup> which prohibits an employer from discriminating against employees who join a labor union.<sup>153</sup> Congress also established the National Labor Review Board (NLRB) to enforce and uphold the terms of the NLRA.<sup>154</sup> Additionally, in 1964, Congress passed Title VII of the 1964 Civil Rights Act,<sup>155</sup> which prohibits employers from using race, color, religion, sex, or national origin as a basis for hiring, firing, or determining compensation and employment terms.<sup>156</sup> Whether these statutes apply to all employees, or

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148. Passel, *supra* note 20, at 26.

149. *Id.* at 30.

150. *Id.*

151. See Martinez, *supra* note 143, at 669.

152. 29 U.S.C. §§ 151-169 (2000).

153. See Martinez, *supra* note 143, at 666.

154. 29 U.S.C. § 152.

155. 42 U.S.C. § 2000e-2 (2000).

156. *Id.* § 2000e-2(a)(1).

It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .

*Id.*

only legally employed workers, is unclear.<sup>157</sup>

In 1984, the Supreme Court held that the NLRA affords protection to both legal and undocumented employees.<sup>158</sup> The NLRB's definition of employee "include[s] any employee' . . . subject only to certain specifically enumerated exceptions."<sup>159</sup> Since the NLRA did not expressly exempt undocumented workers from this definition, the Court held that undocumented workers are considered "employees" for the purposes of the NLRA, and therefore, were equally deserving of its protection.<sup>160</sup> However, in 2002, the Supreme Court overruled a decision by the NLRB to award backpay to an undocumented immigrant who was fired for supporting union efforts.<sup>161</sup> The Court stated: "[A]llowing the Board to award backpay to illegal aliens would unduly trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed in IRCA. It would encourage the successful evasion of apprehension by immigration authorities, condone prior violations of the immigration laws, and encourage future violations."<sup>162</sup> This result put into question the rights of undocumented workers under other federal employment statutes.<sup>163</sup> The U.S. Department of Labor addressed this issue in light of the Supreme Court's 2002 decision:<sup>164</sup>

The Supreme Court did not address laws the Department of Labor enforces, such as the Fair Labor Standards Act (FLSA) and the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), that provide core labor

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157. Martinez, *supra* note 143, at 669.

158. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891-92 (1984).

159. *Id.* at 891 (citing 29 U.S.C. § 152(3)).

160. *Id.*

The Board has consistently held that undocumented aliens are "employees" within the meaning of § 2(3) of the [NLRA]. . . . Since the task of defining the term "employee" is one that "has been assigned primarily to the agency created by Congress to administer the Act," the Board's construction of that term is entitled to considerable deference, and we will uphold any interpretation that is reasonably defensible.

*Id.* (quoting *NLRB v. Hearst Publ'ns, Inc.*, 322 U.S. 111, 130 (1944)).

161. *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137, 140 (2002).

162. *Id.* at 138.

163. Martinez, *supra* note 143, at 672-73.

164. Employment Standards Admin., U.S. Dep't of Labor, Fact Sheet #48: Application of U.S. Labor Laws to Immigrant Workers: Effect of *Hoffman Plastics* Decision on Laws Enforced by the Wage and Hour Division, at <http://www.dol.gov/esa/regs/compliance/whd/whdfs48.htm> (last visited Apr. 5, 2007).

protections for vulnerable workers. The Department's Wage and Hour Division will continue to enforce the FLSA and MSPA without regard to whether an employee is documented or undocumented.<sup>165</sup>

Thus, although the exact scope of the rights of illegal immigrants in the workforce is unclear, it is certain that the federal government does not completely deprive undocumented immigrants of the benefits of United States law in the context of employment.

The future for undocumented immigrants currently working their way through primary and secondary education does not look promising. Even if undocumented immigrants are able to acquire the funds to pay for a college education, they will meet the greater challenge of earning gainful employment upon graduation, as they cannot legally work in the United States.<sup>166</sup>

### *C. A Proposed Solution: The DREAM Act*

The hope for many undocumented immigrant students remains in the prospect of future change. The eyes of a specific group of undocumented immigrants are fixed on proposed legislation that, if enacted, would change everything for them—a Senate bill appropriately entitled the DREAM Act. The DREAM Act is a bill to “amend [IIRIRA] to permit States to determine State residency for higher education purposes and to authorize the cancellation of removal and adjustment of status of certain students who are long-term United States residents and who entered the United States as children . . . .”<sup>167</sup> Senator Orrin G. Hatch of Utah first introduced the DREAM Act to the United States Senate in August 2001 before the 107th Congress.<sup>168</sup> Since then, the DREAM Act has come before the 108th Congress,<sup>169</sup> and twice before the 109th Congress, first standing alone as its own bill,<sup>170</sup> and then included as an amendment to the Comprehensive Immigration Reform Act of 2006.<sup>171</sup> The

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165. *Id.*

166. See 8 U.S.C. § 1324a (2000).

167. S. 2075, 109th Cong. (2005).

168. S. 1291, 107th Cong. (2001).

169. S. 1545, 108th Cong. (2003).

170. S. 2075.

171. S. 2612, 109th Cong. (2006).

110th Congress<sup>172</sup> is now in session, and thus far, the DREAM Act has been introduced as a stand-alone bill before the Senate and referred to the Committee on the Judiciary.<sup>173</sup> Whether the DREAM Act will also be couched in a more expansive immigration reform bill, is yet undecided. Although the Comprehensive Immigration Reform Act of 2007 was introduced on January 4, 2007, it merely served as a placeholder; the actual text of the bill has not been drafted.<sup>174</sup>

Although the text of the DREAM Act has changed slightly since 2001, the basic purpose has remained constant.<sup>175</sup> The DREAM Act aims to accomplish two major goals: first, it would resolve the question of whether states can continue to offer undocumented immigrants in-state tuition rates by repealing IIRIRA;<sup>176</sup> second, it would make both higher education and future employment more accessible to certain undocumented immigrants by providing them with the opportunity to obtain conditional legal status upon graduation from high school,<sup>177</sup> and permanent legal status later on,<sup>178</sup> as well as providing eligibility for certain federal aid benefits.<sup>179</sup>

The DREAM Act, as proposed in S. 2075, is divided into twelve sections.<sup>180</sup> In introducing the legislation, section 1 states the title of the bill and section 2 defines “institution of higher education”<sup>181</sup> and “uniformed services”<sup>182</sup> for purposes

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172. S. 774, 110th Cong. (2007).

173. S. 774, 110th Cong. (2007); GovTrack.us, S. 774: Development, Relief, and Education for Alien Minors Act off 2007, <http://www.govtrack.us/congress/bill.xpd?bill=s110-774> (last visited May 7, 2007).

174. S. 9, 110th Cong. (2007); GovTrack.us, S. 9: Comprehensive Immigration Reform Act of 2007, <http://www.govtrack.us/congress/bill.xpd?tab=main&bill=s110-9> (last visited Feb 28, 2007).

175. See S. 2075; S. 1291.

176. *Id.*

177. S. 2075 § 4.

178. *Id.* § 5.

179. *Id.* § 11.

180. *Id.* The most recently proposed version of the DREAM Act is substantively the same as the version presented to the 109th Congress. For reference purposes, this comment will outline in detail the version of the DREAM Act proposed in S. 2075—the DREAM Act of 2005. See S. 2075.

181. S. 2075 § 1. “The term ‘institution of higher education’ has the meaning given that term in section 101 of the Higher Education Act of 1965 (20 U.S.C.



of the DREAM Act.<sup>183</sup> Section 3 would repeal section 505 of IIRIRA.<sup>184</sup> As addressed above, IIRIRA states that an illegal alien is ineligible for residence-based post-secondary education benefits unless every citizen or national of the United States is afforded the same benefit, regardless of residence.<sup>185</sup> By repealing section 505, the DREAM Act would return the authority to determine whether undocumented immigrants are eligible for in-state tuition rates to the states.<sup>186</sup>

Next, section 4 of the DREAM Act would provide "conditional legal status" to certain undocumented immigrants who satisfy the bill's enumerated requirements: "[T]he Secretary of Homeland Security may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence . . . an alien who is inadmissible or deportable from the United States. . . ."<sup>187</sup> if the alien satisfies certain requirements set forth in the Act. First, the alien must have been "present in the United States for a continuous period of not less than 5 years immediately preceding the date of enactment of this Act, and had not yet reached the age of 16 years at the time of entry."<sup>188</sup> Second, the alien must have maintained good moral character<sup>189</sup> since

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1001)." *Id.*

182. *Id.* § 2. "The term 'uniformed services' has the meaning given that term in section 101(a) of title 10, United States Code." *Id.*

183. *Id.* §§ 1-2.

184. *Id.* § 3.

185. 8 U.S.C. § 1623 (2000).

186. S. 2075 § 3.

187. *See id.* § 4.

188. *Id.*

189. For the purposes of the Immigration and Nationality Act:

No person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established, is, or was—

(1) a habitual drunkard;

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(3) a member of one or more of the classes of persons, whether inadmissible or not, described in paragraphs (2)(D), (6)(E), and (10)(A) of section 212(a) of this Act; or subparagraphs (A) and (B) of section 212(a)(2) and subparagraph (C) thereof of such section (except as such paragraph relates to a single offense of simple possession of 30 grams or less of marihuana), if the offense described therein, for which such person was convicted or of which he admits the commission, was committed during such period;

(4) one whose income is derived principally from illegal gambling

his or her time of initial entry into the United States.<sup>190</sup> Third, the alien must not be inadmissible or deportable for certain violations set forth in the Immigration and Nationality Act,<sup>191</sup> or if some such violations were committed, the alien must have been under the age of sixteen at the time of the acts to maintain eligibility.<sup>192</sup> Finally, the alien must

activities;

(5) one who has been convicted of two or more gambling offenses committed during such period;

(6) one who has given false testimony for the purpose of obtaining any benefits under this Act;

(7) one who during such period has been confined, as a result of conviction, to a penal institution for an aggregate period of one hundred and eighty days or more, regardless of whether the offense, or offenses, for which he has been confined were committed within or without such period;

(8) one who at any time has been convicted of an aggravated felony (as defined in subsection (a)(43)); or

(9) one who at any time has engaged in conduct described in section 212(a)(3)(E) (relating to assistance in Nazi persecution, participation in genocide, or commission of acts of torture or extrajudicial killings) or 212(a)(2)(G) (relating to severe violations of religious freedom).

The fact that any person is not within any of the foregoing classes shall not preclude a finding that for other reasons such person is or was not of good moral character. In the case of an alien who makes a false statement or claim of citizenship, or who registers to vote or votes in a Federal, State, or local election (including an initiative, recall, or referendum) in violation of a lawful restriction of such registration or voting to citizens, if each natural parent of the alien (or, in the case of an adopted alien, each adoptive parent of the alien) is or was a citizen (whether by birth or naturalization), the alien permanently resided in the United States prior to attaining the age of 16, and the alien reasonably believed at the time of such statement, claim, or violation that he or she was a citizen, no finding that the alien is, or was, not of good moral character may be made based on it.

8 U.S.C. § 1101(f).

190. S. 2075 § 4.

191. *Id.*

192. *Id.*

[T]he alien—

(i) is not inadmissible under paragraph (2), (3), (6)(B), (6)(C), (6)(E), (6)(F), or (6)(G) of section 212(a) of the Immigration and Nationality Act (8 U.S.C. 1182(a)), or, if inadmissible solely under subparagraph (C) or (F) of paragraph (6) of such subsection, the alien was under the age of 16 years at the time the violation was committed; and

(ii) is not deportable under paragraph (1)(E), (1)(G), (2), (3)(B), (3)(C), (3)(D), (4), or (6) of section 237(a) of the Immigration and Nationality Act (8 U.S.C. 1227(a)), or, if deportable solely under subparagraphs (C) or (D) of paragraph (3) of such subsection, the alien was under the age of 16 years at the time the violation was committed . . . .

*Id.*

have been "admitted to an institution of higher education in the United States, or [have] earned a high school diploma or obtained a general education development certificate in the United States."<sup>193</sup>

Section 5 of the DREAM Act sets forth the terms of the conditional permanent resident status.<sup>194</sup> The conditional status of the alien would last for six years, subject to possible termination if the alien fails to maintain the requirements of the conditional status, becomes a public charge, or receives a dishonorable discharge from the uniformed services.<sup>195</sup> In order for the conditional status to be removed, and for the alien to become a permanent legal resident, the alien would be required to file a petition with the Secretary of Homeland Security.<sup>196</sup> The petition must demonstrate the following: that the alien has maintained good moral character during the period of conditional status; has remained in compliance with the qualifications of earning that status; has not left the United States during the conditional period for more than 365 days in the aggregate, unless the absence was a result of active service in the United States uniformed services; and has either received a degree from an institution of higher education in the United States or finished two years in a program toward the acquisition of such a degree, or served for at least two years in the uniformed services.<sup>197</sup> The alien must also provide in the petition a list of all United States secondary educational institutions that he or she has attended.<sup>198</sup>

The DREAM Act, if passed, would provide its beneficiaries with opportunities they would not otherwise receive, and protection from deportation so they realize these opportunities. Section 11 of the DREAM Act addresses the issue of financial assistance for higher education.<sup>199</sup> Once the alien student is able to adjust his or her status to permanent legal resident, he or she would become eligible for student

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193. *Id.*

194. *Id.* § 5.

195. *Id.* at § 5(b). If conditional status is terminated, the alien will return to the immigration status he or she held immediately prior to receiving conditional status. *Id.* at § 5(b)(2).

196. S. 2075 § 5(c)(1).

197. *Id.* §§ 5(d)(1)(A)-(C).

198. *Id.* § 5(d)(1)(E).

199. *Id.* § 11.

loans and federal work-study programs,<sup>200</sup> making college more affordable and a more realistic possibility. Section 5 states that during the conditional period, the alien would be considered a lawful permanent resident for purposes of the Immigration and Nationality Act.<sup>201</sup> Section 9 sets forth confidentiality requirements to protect the information provided by DREAM Act applicants, including a prohibition on using the applicant's information to initiate removal proceedings.<sup>202</sup>

Our immigration laws prevent thousands of young people from pursuing their dreams and fully contributing to our nation's future. These young people have lived in this country for most of their lives. It is the only home they know. They are Americans in every sense except their technical legal status . . . . They are honor roll students, star athletes, talented artists and valedictorians. These children are tomorrow's doctors, nurses, teachers, policemen, firefighters, soldiers, and senators.<sup>203</sup>

The DREAM Act would provide these young immigrants with the chance to fulfill their potential, to excel in education and in a career, and to continue in life beside the American peers that have sat beside them in their primary school classes from kindergarten through high school.

### III. IDENTIFICATION OF THE PROBLEM

First proposed by Senator Hatch before the Senate of the 107th Congress,<sup>204</sup> the DREAM Act was sent to the Senate Judiciary Committee and placed on the Senate legislative calendar, but never received a floor vote.<sup>205</sup> Two years later, Senator Hatch introduced the DREAM Act before the Senate of the 108th Congress,<sup>206</sup> but again, the Senate never voted on

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200. *Id.*

201. 8 U.S.C. § 1101(a)(20) (2000). "The term 'lawfully admitted for permanent residence' means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed." *Id.*

202. S. 2075 § 9.

203. U.S. Senator Dick Durbin, *Comprehensive Immigration Reform Legislation Approved by Senate*, May 25, 2006, <http://durbin.senate.gov/record.cfm?id=256195>.

204. S. 1291, 107th Cong. (2001).

205. S. REP. NO. 104-224, at 3 (2004), available at <http://thomas.loc.gov/cgi-bin/cpquery/T?&report=sr224&dbname=108&>.

206. S. 1545, 108th Cong. (2003).

the bill.<sup>207</sup> Senator Durbin then proposed the DREAM Act to the Senate of the 109th Congress,<sup>208</sup> and yet again, the Senate took no action.<sup>209</sup> Finally, in 2006, the DREAM Act gained some traction. Couched as an amendment to the Comprehensive Immigration Reform Act of 2006 (S. 2611),<sup>210</sup> the DREAM Act passed the Senate with a 62-36 vote.<sup>211</sup> However, the progress halted there. As the 109th Congress came to an end, S. 2611 saw no further action.<sup>212</sup> Having not been signed into law by the end of the 109th session, the bill was terminated along with the DREAM Act provisions.<sup>213</sup>

With the 110th Congress now in session, the fate of the DREAM Act remains uncertain. On January 4, 2007, Senator Harry Reid of Nevada introduced S. 9: The Comprehensive Immigration Reform Act of 2007 (S. 9) before the 110th Senate, which states that the Senate and House should pass, and the president should sign, immigration reform legislation.<sup>214</sup> As currently written, S. 9 is merely a placeholder for a bill which has not yet been drafted.<sup>215</sup> It reinforces the intent to create immigration reform legislation, and has been referred to the Senate Committee on the Judiciary for the purpose of doing so.<sup>216</sup> On March 6, 2007, Senator Richard Durbin of Illinois introduced the DREAM Act as a free-standing bill before the 110th Senate, and it too has been referred to the Senate Committee on the Judiciary.<sup>217</sup> Regardless, whether the DREAM Act progresses on its own or as part of a larger reform bill, the reality remains that after five years and three sessions of Congress,<sup>218</sup> the DREAM Act remains just that—a dream.

Currently, the DREAM Act has significant support, but

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207. Nat'l Immigration Law Ctr., *supra* note 22.

208. S. 2075, 109th Cong. (2005).

209. ANDORRA BRUNO, CRS REPORT FOR CONGRESS, UNAUTHORIZED ALIEN STUDENTS: ISSUES AND "DREAM ACT" LEGISLATION 5 (2007), *available at* [http://www.opencrs.com/rpts/RL33863\\_20070130.pdf](http://www.opencrs.com/rpts/RL33863_20070130.pdf).

210. *Id.*

211. GovTrack.us, S. 2611 [109th]: Comprehensive Immigration Reform Act of 2006, <http://www.govtrack.us/congress/bill.xpd?bill=s109-2611>.

212. BRUNO, *supra* note 209, at 5.

213. GovTrack.us, *supra* note 211.

214. S. 9, 110th Cong. (2007).

215. GovTrack.us, *supra* note 211.

216. *Id.*

217. GovTrack.us, *supra* note 174.

218. S. 2075, 109th Cong. (2005).

equally strong opposition. In the 2003 Senate Judiciary Committee vote, the DREAM Act passed sixteen to three,<sup>219</sup> and in 2006, S. 2611, which contained the DREAM Act, passed the Senate 62-36. Nevertheless, the DREAM Act has continually failed to generate enough momentum to pass both houses of Congress and be signed into law. Senator Durbin, a co-sponsor of the DREAM Act, praises the bill for “giving thousands of young students the freedom to dream of a future with genuine educational and employment opportunities. . . .”<sup>220</sup> Senator Jeff Sessions takes a different view, calling the DREAM Act a “cyclical nightmare for the rule of law in immigration policy reform . . . [that] erodes the rule of law and promotes future illegal immigration. . . .”<sup>221</sup>

Every year, 65,000 U. S.-raised undocumented immigrants graduate from high school<sup>222</sup> and each year, these 65,000 students struggle with the next step in their future.<sup>223</sup> One such student explained, “We’ve gone to high school at taxpayer’s expense, and now we can’t give back to the community because we face deportation . . . . The [DREAM] Act is not only for our benefit, but for everybody. We would be able to start giving back to the community.”<sup>224</sup> The DREAM Act, as currently drafted, has not been passed, and until this bill or similar legislation finds its way into law, undocumented immigrants have no hope for a brighter future.

#### IV. ANALYSIS

The repeated failed attempts to enact the DREAM Act can be attributed to legal, social, and political obstacles. First, the opposition contends that the DREAM Act creates incentives for and encourages illegal immigration.<sup>225</sup> Second, challengers question whether the DREAM Act conflicts with

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219. S. REP. NO. 104-224, at 3 (2004).

220. U.S. Senator Dick Durbin, *supra* note 12.

221. S. REP. NO. 104-224, at 12.

222. Nat’l Immigration Law Ctr., *supra* note 22.

223. *Id.*

224. Steven Greenhouse, *Congress Looks to Grant Legal Status to Immigrants*, N.Y. TIMES, Oct. 13, 2003, at A9 (quoting eighteen-year-old Yuliana Huicochea, an illegal immigrant who has lived in the United States since she was four).

225. See *infra* Part IV.A.

existing federal legislation.<sup>226</sup> Third, some object to granting undocumented immigrants in-state tuition rates and financial aid because of the financial burden on state and federal governments, as well as the unfairness to legal residents not afforded the same benefits.<sup>227</sup> Finally, political pressures and the controversial nature of immigration issues have created an environment unsuitable for passing this legislation.<sup>228</sup>

#### A. *Encouraging Illegal Immigration*

Alabama Republican Senator Jeff Sessions made the following statement in a Senate Report to the 108th Congress discussing the DREAM Act:

We must not provide legal incentives and rewards for violations of our immigration laws. We cannot threaten deportation for illegal entry, while we simultaneously tell illegal aliens that if they manage to stay in the United States for just a few years illegally working or going to school, we will pass legislation that gives them permission to stay forever, and gives them a guaranteed route to citizenship. It is a confusing and contradictory message, a message that cannot be the basis for the sound immigration policy of a mature nation.<sup>229</sup>

In addressing Senator Sessions' claim that the DREAM Act encourages illegal immigration, Senator Hatch explained that the DREAM Act was drafted specifically to avoid this issue.<sup>230</sup> The DREAM Act would not be universally applied to all undocumented immigrants currently living in the United States, nor would it affect those undocumented immigrants who will come in the future.<sup>231</sup> As Hatch clarified, "The Act specifically limits eligibility to those who entered the United States five years or more prior to the bill's enactment . . . who already reside in the United States and who have demonstrated favorable equities in and significant ties to the

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226. See *infra* Part IV.B.

227. See *infra* Part IV.C.

228. See *infra* Part IV.D.

229. S. REP. NO. 104-224, at 12-14 (2004).

230. "S. 1545, *The Dream Act*": *Hearing Before the S. Comm. on the Judiciary*, 108th Cong. (2003) (statement of Sen. Orrin G. Hatch, Chairman, S. Comm. on the Judiciary), available at [http://hatch.senate.gov/index.cfm?FuseAction=PressReleases.View&PressRelease\\_id=915](http://hatch.senate.gov/index.cfm?FuseAction=PressReleases.View&PressRelease_id=915) [hereinafter *S. 1545 Hearing*].

231. *Id.*

United States.”<sup>232</sup> The DREAM Act, therefore, is not an immigration reform bill in the sense that it has long-standing effects on immigration policy for an unlimited time. On the contrary, the DREAM Act focuses narrowly on immigrants who are already living in the United States, and even more specifically on those who entered the country five or more years before the enactment of the bill, and were under sixteen at the time of entry.<sup>233</sup>

Moreover, the Supreme Court in *Plyler* cited the lower court’s finding that undocumented immigrants do not come to the United States seeking education, but rather, employment opportunities.<sup>234</sup> While the DREAM Act does not expressly authorize the employment of “undocumented immigrants,” it does address employment in the sense that it would provide a way for undocumented immigrants to legally enter the workforce as a result of the legal status gained from educational or military achievement.<sup>235</sup> Although IRCA expressly prohibits the employment of undocumented immigrants,<sup>236</sup> the DREAM Act would only afford employment opportunities to a very select group of immigrants already living in the United States, and only after they fulfill all the requirements of the Act.

Additionally, the legal status awarded to DREAM Act beneficiaries would only extend to individuals, and would not create a family-wide amnesty. The DREAM Act offers the opportunity for legal status only to those who came as children, and not to the parents who made the affirmative decision to break U. S. law by entering the country without documentation.<sup>237</sup> However, once one receives permanent legal status under the DREAM Act, he or she may file family petitions for certain other family members to gain legal status as well.<sup>238</sup> Section 1153 of the Immigration and Nationality Act<sup>239</sup> provides the preference order for granting visas<sup>240</sup>

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232. *Id.*

233. S. 2075, 109th Cong. § 4 (2005).

234. *Plyler v. Doe*, 457 U.S. 202, 229 n.24 (1982).

235. See S. 2075 §§ 5(d)(1)(A)-(C).

236. 8 U.S.C. § 1324 (2000).

237. See S. 2075 § 4.

238. See 8 U.S.C. § 1153(a).

239. The Immigration and Nationality Act, codified at 8 U.S.C. §§ 1101-1775, is the federal law that governs immigration.

240. The U.S. Department of State describes visas as follows:



based on family relationships.<sup>241</sup> Under that provision, a legal permanent resident may petition for visas for the following family members: spouse, children under the age of twenty-one, and unmarried sons and daughters over the age of twenty-one.<sup>242</sup> The petition process, however, is not immediate, and the waiting period can last many years. For example, for legal permanent residents petitioning for a family member from Mexico,<sup>243</sup> the federal government will issue visas in May of 2007 to spouses and children<sup>244</sup> of legal permanent residents who filed their petition before January 1, 2001, and to unmarried sons and daughters<sup>245</sup> of legal permanent residents who filed petitions before March 1, 1992.<sup>246</sup> Otherwise stated, an unmarried son or daughter of a Mexican legal permanent resident who receives a visa in May 2007 waited nearly fourteen-and-a-half years. Given that there are only a certain number of visas available per year,<sup>247</sup>

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A visa allows you to travel to the United States as far as the port of entry (airport or land border crossing) and ask the immigration officer to allow you to enter the country. . . . There are two categories of U.S. visas: immigrant and nonimmigrant. Immigrant visas are for people who intend to live permanently in the U.S. Nonimmigrant visas are for people with permanent residence outside the U.S. but who wish to be in the U.S. on a temporary basis—for tourism, medical treatment, business, temporary work or study.

UnitedStatesVisas.gov, What is a Visa?, <http://www.unitedstatesvisas.gov/whatis/index.html> (last visited Apr. 5, 2007). "The term 'immigrant visa' means an immigrant visa required by this Act and properly issued by a consular officer at his office outside of the United States to an eligible immigrant under the provisions of this Act." 8 U.S.C. § 1101(a)(16).

241. 8 U.S.C. § 1153(a).

242. *Id.*

243. The time may change depending on what country the immigrant is from. See U.S. Dep't of State, Visa Bulletin (May. 2007), at [http://travel.state.gov/visa/frvi/bulletin/bulletin\\_3219.html](http://travel.state.gov/visa/frvi/bulletin/bulletin_3219.html).

244. For the purposes of the Immigration and Nationality Act, "[t]he term 'child' means an unmarried person under twenty-one years of age." 8 U.S.C. § 1101(b)(1).

245. "Unmarried sons and daughters" refers to the children of the petitioner who were twenty-one years old or older when they filed the petition and therefore were not "children" as defined by the Immigration and Nationality Act. See *id.* §§ 1101(b)(1), 1153(a).

246. U.S. Dep't of State, *supra* note 243.

247. Under the United States Code:

(a) . . . .

(1) . . . . Qualified immigrants who are the unmarried sons or daughters of citizens of the United States shall be allocated visas in a number not to exceed 23,400, plus any visas not required for the class specified in paragraph (4).

the wait time could very well increase as more petitions are filed. Thus, the likelihood that a family petition creates some incentive for illegal immigration seems minimal in light of the lengthy waiting period and the fact that only the spouse or child of a legal permanent resident can apply for a family petition.

*B. A Conflict of Law: The DREAM Act and Federal Legislation*

At first glance, the DREAM Act appears to conflict with existing federal laws pertaining to the education and employment of undocumented immigrants.<sup>248</sup> The DREAM Act, however, does not conflict with the PRWORA or IRCA; all three laws can co-exist and be enforced simultaneously. Under the DREAM Act, certain post-secondary financial assistance, student loans and work study programs would be available to a particular class of immigrants.<sup>249</sup> PRWORA expressly denies such benefits to aliens who are not “qualified”<sup>250</sup>—essentially, those who lack legal permission to be in the United States.<sup>251</sup> The beneficiaries of the DREAM Act, however, fall within the definition of “qualified” as

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(2) . . . Qualified immigrants—

(A) who are the spouses or children of an alien lawfully admitted for permanent residence, or

(B) who are the unmarried sons or unmarried daughters (but are not the children) of an alien lawfully admitted for permanent residence, shall be allocated visas in a number not to exceed 114,200, plus the number (if any) by which such worldwide level exceeds 226,000, plus any visas not required for the class specified in paragraph (1); except that not less than 77 percent of such visa numbers shall be allocated to aliens described in subparagraph (A).

(3) . . . Qualified immigrants who are the married sons or married daughters of citizens of the United States shall be allocated visas in a number not to exceed 23,400, plus any visas not required for the classes specified in paragraphs (1) and (2).

(4) . . . Qualified immigrants who are the brothers or sisters of citizens of the United States, if such citizens are at least 21 years of age, shall be allocated visas in a number not to exceed 65,000, plus any visas not required for the classes specified in paragraphs (1) through (3).

8 U.S.C. § 1153(a).

248. See *id.* §§ 1324a, 1601, 1623.

249. S. 2075, 109th Cong. § 11 (2005).

250. See 8 U.S.C. § 1641; see also *supra* note 99 and accompanying text.

251. 8 U.S.C. § 1601.

contained in PRWORA.<sup>252</sup> PRWORA states that qualified aliens include those “lawfully admitted for permanent residence under the Immigration and Nationality Act,”<sup>253</sup> and under the Immigration and Nationality Act, “lawfully admitted for permanent residence” means “the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws. . . .”<sup>254</sup> The DREAM Act would grant eligible undocumented immigrants conditional legal residency, and later, permanent legal residency. The DREAM Act expressly states that the immigrant, as a conditional legal resident, would be treated as a legal permanent resident for the purposes of naturalization and status.<sup>255</sup> Therefore, by making the beneficiaries conditional or permanent legal residents, the DREAM Act would not conflict with PRWORA, but rather, would bring them into compliance with the laws of the United States by making this select group “qualified.”

Likewise, the DREAM Act does not conflict with IRCA, which prevents employers from knowingly hiring or continuing the employment of illegal aliens.<sup>256</sup> Beneficiaries of the DREAM Act would not be exempted from IRCA, but rather, redefined as conditional and permanent legal residents, as opposed to illegal aliens in violation of federal law.<sup>257</sup> A parallel argument has been proposed with regard to state tuition laws.<sup>258</sup> Although the Supreme Court has yet to address the issue, one argument supports the view that tuition laws that exempt undocumented immigrants from non-resident tuition rates are less likely to survive than those that redefine the criterion for in-state tuition rates to include undocumented immigrants.<sup>259</sup>

Though the DREAM Act does not conflict with PRWORA or IRCA, it would expressly repeal section 505 of IIRIRA<sup>260</sup> in

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252. *See id.* § 1641; *See also supra* note 99 and accompanying text.

253. 8 U.S.C. § 1641.

254. *Id.* § 1101(a)(20).

255. S. 2075, 109th Cong. § 5 (2005).

256. 8 U.S.C. § 1324.

257. S. 2075 § 4.

258. Salsbury, *supra* note 80, at 478.

259. *Id.*

260. 8 U.S.C. § 1623; *see also supra* Part II.A.2.b.

its present form.<sup>261</sup> In that regard, the opposition to the bill correctly states that the DREAM Act directly conflicts with current federal immigration laws. Though IIRIRA is still in effect, it is not producing the results intended by Congress.<sup>262</sup> The House Conference Report regarding IIRIRA stated that “this section provides that illegal aliens are not eligible for in-state tuition rates at public institutions of higher education.”<sup>263</sup> Regardless, illegal students in California, Texas, Utah, New York, Washington, Illinois, Oklahoma, Kansas, and New Mexico are all currently afforded the benefit of in-state tuition.<sup>264</sup>

There is a clear conflict between state laws granting in-state tuition rates to undocumented students and federal laws forbidding the practice, leaving confusion regarding where the law stands. One thing is certain, however—some states are currently enforcing IIRIRA, and others are implementing their own laws in its place.<sup>265</sup> The DREAM Act, despite its apparent conflict with current federal law regarding post-secondary tuition rates, is consistent with the recent trend of extending in-state tuition to undocumented immigrants.<sup>266</sup>

It cannot be denied that the DREAM Act grants benefits to a group of immigrants who entered and remain illegally in the United States. Senator Sessions adamantly objects to making it advantageous for some to disregard U. S. law: “If the DREAM Act becomes law, we will openly state to the world that it is the policy of the United States to continue our cycle of rewarding people who break our immigration laws with eventual legal status and even citizenship.”<sup>267</sup> Senator Sessions’ concerns are clearly warranted given that some employers hire undocumented immigrants, despite IRCA’s express prohibition of the practice, and the federal law protects those undocumented workers from unfair treatment

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261. S. 2075.

262. Krueger, *supra* note 116.

263. Maki, *supra* note 115.

264. Krueger, *supra* note 116.

265. *Id.*

266. *Id.* In 2001, Texas and California enacted their in-state tuition statutes, followed by two more states—Utah and New York—in 2002, then another three—Illinois, Oklahoma, and Washington—in 2003, Kansas in 2004, and most recently, New Mexico in 2005. *Id.*

267. S. REP. NO. 104-224, at 3 (2004).

once they are hired.<sup>268</sup> The *Plyler* Court's statement that employment is the greatest incentive for immigration<sup>269</sup> further supports Senator Sessions' argument.

In order to combat the criticism of Senator Sessions and others who share his views, the DREAM Act must create better opportunities for undocumented immigrants while refraining from rewarding violations of the law. Senator John Cornyn articulated such a balance in the committee report to the 108th Congress.<sup>270</sup> Cornyn, who voted in favor of the DREAM Act in committee, voiced his concerns in the report.<sup>271</sup> He noted that the 2001 version of the DREAM Act required that undocumented students graduate from a four or two year institution before their status could change from conditional to permanent legal resident.<sup>272</sup> However, the DREAM Act of 2003 reduced that requirement to graduating from a four year institution or completing two years towards a degree from an institution of higher education.<sup>273</sup> Cornyn stated:

If we are serious that the intent of the [DREAM] Act is about education, then I think we should require these students to graduate from a qualified institution of higher learning in order to receive legal permanent residency . . . we need to make clear that what we are seeking is people that actually receive a degree which will provide them the opportunity that I think this bill is determined to provide.<sup>274</sup>

Nonetheless, the DREAM Act of 2005 and the version that appeared in S. 2611 still reflected the requirements of the 2003 version of the bill, which was likely too lenient for the opposition's taste.<sup>275</sup>

### C. *In-State Tuition: Finances and Fairness*

Arguably the most significant area of opposition to the DREAM Act centers on the issue of in-state tuition. Senator

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268. Employment Standards Admin., *supra* note 164.

269. *Plyler v. Doe*, 457 U.S. 202, 228 (1982).

270. S. REP. NO. 104-224, at 15.

271. *Id.*

272. *Id.*

273. S. 1545, 108th Cong. (2003).

274. S. REP. NO. 104-224, at 12 (internal citations omitted).

275. S. 2075, 109th Cong. (2005).

Saxby Chambliss expressed concern about the financial burden to state and federal governments because the DREAM Act would require state governments to support additional students in their schools and the federal government to support additional federal loan requests.<sup>276</sup> Senator Sessions argued that the DREAM Act reflects a lack of fairness to out-of-state citizens because it denies them in-state tuition rates while granting undocumented immigrants this benefit.<sup>277</sup> Kris W. Kobach, the attorney for the plaintiffs in *Day*, reiterated these arguments after S. 2611 passed, stating that the DREAM Act is a “gift to illegal aliens [that] costs taxpayers a great deal of money at a time when tuition rates are rising across the country”<sup>278</sup> and that, “not only are such laws unfair to aliens who follow the law, but they are slaps in the faces of law-abiding American citizens.”<sup>279</sup> The Federation for American Immigration Reform (FAIR)<sup>280</sup> argued that the DREAM Act will result in undocumented immigrants taking away opportunities that would otherwise be available to U.S. citizens.<sup>281</sup> FAIR’s executive director, Dan Stein, stated that:

Orrin Hatch now wants to force the children of U.S. citizens to compete for admission and shrinking tuition assistance programs with people who are in the country illegally. He and his colleagues are literally taking opportunities and tuition assistance away from the children of citizens and giving them to illegal aliens.<sup>282</sup>

Senator Hatch denies that the DREAM act will create a

276. S. REP. NO. 104-224, at 14.

277. *Id.* at 12.

278. Kris W. Kobach, *The Senate Immigration Bill Rewards Lawbreaking: Why the DREAM Act is a Nightmare*, BACKGROUNDER (Heritage Found., Wash., D.C.), Aug. 14, 2006, available at [http://www.heritage.org/research/immigration/upload/bg\\_1960.pdf](http://www.heritage.org/research/immigration/upload/bg_1960.pdf).

279. *Id.*

280. “The Federation for American Immigration Reform (FAIR) is a national, nonprofit, public-interest, membership organization of concerned citizens who share a common belief that our nation’s immigration policies must be reformed to serve the national interest.” Fed’n for Am. Immigration Reform [FAIR], About FAIR, [http://www.fairus.org/site/PageServer?pagename=about\\_aboutmain](http://www.fairus.org/site/PageServer?pagename=about_aboutmain) (last visited Apr. 5, 2007).

281. Press Release, FAIR, The “DREAM Act”: Hatch-ing Expensive New Amnesty for Illegal Aliens (Oct. 23, 2003), available at [http://www.fairus.org/site/PageServer?pagename=media\\_mediaf23a](http://www.fairus.org/site/PageServer?pagename=media_mediaf23a).

282. *Id.*

financial burden on state and federal governments. In his report to the 108th Congress, Hatch provided the Congressional Budget Office's (CBO) cost estimates for enacting the DREAM Act.<sup>283</sup> The CBO estimated in 2003 that the increase in direct spending for the student loan provision would not be significant from 2004 to 2008.<sup>284</sup>

The National Immigration Law Center argues that the DREAM Act would create a positive fiscal impact on the United States.<sup>285</sup> According to a 1999 RAND study, an average 30- year-old immigrant who graduated from high school and college paid \$5,300 more in taxes and cost \$3,900 less in criminal justice and welfare expenses annually than an immigrant who never finished high school.<sup>286</sup> Additionally, the study found that an average immigrant woman who graduates from college as a result of the DREAM Act would likely increase her pre-tax income at age 30 by more than \$13,500 annually over what she would have made had she never graduated from high school.<sup>287</sup>

The Supreme Court has not yet ruled on whether undocumented immigrants should be granted in-state tuition rates, but it held in *Plyler* that undocumented immigrants must be afforded a free public education through high school.<sup>288</sup> The Court held that the Texas statute denying such an opportunity was not justified because it "impose[d] its discriminatory burden on the basis of a legal characteristic over which children can have little control."<sup>289</sup> The Court did not want to punish those children for the acts of their parents.<sup>290</sup> Now, those children have grown up and want to continue their education and eventually find a job, but federal law makes college unaffordable and employment illegal. It makes little sense to say these undocumented immigrants should not be punished as children, but should be punished as adults. If the Supreme Court were to strike down a federal law, such as the DREAM Act, that further extends the

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283. S. REP. NO. 104-224, at 7 (2004).

284. *Id.*

285. Nat'l Immigration Law Ctr., *supra* note 22.

286. *Id.*

287. *Id.*

288. *See Plyler v. Doe*, 457 U.S. 202, 230 (1982).

289. *Id.* at 220.

290. *See id.*

educational and employment opportunities for the same class of children whom it sought to protect in *Plyler*, such action would be in direct conflict with the Court's previously expressed public policy.

#### *D. Political Setbacks*

Political pressures play an undeniable role in the inability of Congress to pass the DREAM Act. Immigration is currently a very highly debated topic, with strong views coming from both the Democratic and Republican parties, as well as various public interest groups around the country. As a result, the government is hesitant to enact immigration legislation. In discussing immigration reform, one analyst for the Republican Party stated, "The Bush administration has a delicate balance to strike in appeasing those conservatives by talking tough on border security without alienating Hispanics, women and swing voters."<sup>291</sup>

Another report revealed a significant rift within the Republican Party.<sup>292</sup>

The immigration debate pits one core GOP constituency (law-and-order conservatives) against another (business interests that rely on immigrant labor). One camp wants to tighten borders and deport people who are here illegally; the other seeks to bring illegal workers out of the shadows and acknowledge their growing economic importance.<sup>293</sup>

The clear divide in the Republican Party leaves President Bush in a difficult position.

Some believe the failure of the DREAM Act in 2003 can be attributed to the fact that it was presented on the cusp of a presidential election.<sup>294</sup> After the intense battle for the 2000

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291. Elaine Quijano, *Bush to Focus on Illegal Immigration*, CNN, Nov. 28, 2005, at <http://www.cnn.com/2005/POLITICS/11/27/bush.immigration/>.

292. See Shailagh Murray, *Conservatives Split in Debate on Curbing Illegal Immigration*, WASH. POST, Mar. 25, 2005, at A2.

293. *Id.*

294. Nat'l Immigration Forum, Legislative Wrap-Up: Where Things Were Left in the 108th Congress (Dec. 23, 2004), <http://www.immigrationforum.org/DesktopDefault.aspx?tabid=688>.

In the partisan atmosphere of a presidential election year, none of these proposals gained political momentum, and at the end of the 108th Congress, all introduced legislation expired. In part, this was due to the failure of the candidates at the top of the ticket to embrace



Presidential election, perhaps President Bush did not want to take an affirmative stand on such a controversial bill prior to another election. In reference to a different immigration bill, Democratic Representative Howard Berman of California stated that the Bush administration requested the Senate majority leader, Tennessee Republican Senator Bill Frist, to prevent the bill from being considered by the Senate.<sup>295</sup> "The White House told Frist, 'Don't let this come up.' . . . Not that we're against it. Not that we're for it. Just don't let it come up for a vote."<sup>296</sup> Thus, it is unlikely that the Bush administration would have then supported the DREAM Act in the same term that it actively avoided taking a stand on another immigration bill. After the Senate passed S. 2611, which included the DREAM Act, the bill was sent to the House—specifically, the conference committee meetings—in order to draft a version of the bill that the president would sign into law.<sup>297</sup> Commenting on the future action of the bill, the Judiciary Committee chairman stated, "[t]here is an important issue, political issue, about the ability of Republicans to govern. . . . There is an election in November, and our leadership positions as Republicans is on the line. And I think that will weigh heavily in the conference."<sup>298</sup> Proponents of the DREAM Act, therefore, must overcome both opposition to the provisions of the bill and the political implications evoked by supporting or opposing it.

Finally, the terrorist attacks of September 11, 2001, caused significant setbacks in the plight of the undocumented immigrant.<sup>299</sup> Senator Durbin recognized this issue, stating that "[i]n the aftermath of 9/11, it is vitally important that we fix our immigration system. . . . We have to distinguish between those who would do us harm and those who came to our country to pursue the American dream and are

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immigration reform as a priority.

*Id.*

295. David Rogers, *Ag-JOBS Bill Languishes Despite Bipartisan Support: White House Weighs In To Stop Bill's Progress*, WALL ST. J., July 14, 2004, at A4.

296. *Id.*

297. GovTrack.us, *supra* note 174.

298. *Senate Passes Immigration Bill: GOP Divided Heading into Tough Negotiations with House*, CNN, May 25, 2006, at <http://www.cnn.com/2006/POLITICS/05/25/immigration/index.html>.

299. U.S. Senator Dick Durbin, *supra* note 12.

contributing members of our society.”<sup>300</sup> Senator Durbin clearly classifies DREAM Act beneficiaries in the latter category as a group deserving of better opportunities in the United States.<sup>301</sup>

## V. PROPOSAL

Senator Hatch, in his statement before the Senate Judiciary Committee, told the story of one student who would benefit from the DREAM Act.<sup>302</sup> Senator Durbin was inspired by another.<sup>303</sup> Each year, 65,000 potential DREAM Act beneficiaries graduate from high school.<sup>304</sup> Thus, 65,000 children graduate each year with little hope of going on to college, securing employment, or contributing to society. The solution to this problem proposed by this comment consists of various amendments to the DREAM Act that reflect the expressed opposition and support for the bill in an effort to find a mutually acceptable middle ground.

Opposition to the DREAM Act, simply stated, centers around the concern that the DREAM Act grants illegal aliens significant benefits, that, in the view of some, they do not deserve. To overcome these concerns, the opposition must be reassured that undocumented immigrants are not receiving a free “hand out” from the American people and that these students will actually provide a benefit to the United States.

This comment first proposes that in addition to taking classes at an institution of higher education, undocumented students must also maintain employment during the time they are in school as an additional prerequisite before they may change their status from conditional to legal permanent resident. In making such a proposal, this comment draws from the approach that the federal government takes in issuing parole conditions. Parole is “any form of release of an offender from imprisonment to the community by a releasing authority prior to the expiration of his sentence, subject to conditions imposed by the releasing authority and to its supervision. . . .”<sup>305</sup> It is a status of conditional liberty and

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300. *Id.*

301. *Id.*

302. *S. 1545 Hearing, supra* note 230.

303. *Durbin, Hagel, Lugar, supra* note 12.

304. Nat’l Immigration Law Ctr., *supra* note 22.

305. 18 U.S.C. § 4101(f) (2000).

provides a way for the parolee to become a constructive member of society.<sup>306</sup> To accomplish these goals, those on parole are subject to certain conditions that must be adhered to for the duration of their parole term, "beyond the ordinary restrictions imposed by law on an individual citizen."<sup>307</sup> One common parole condition is a requirement that parolees "seek and maintain employment or participate in education/work training."<sup>308</sup> If the parole conditions are not met, the parole officer may revoke parole and return the parolee to prison.<sup>309</sup>

The conditional legal status under the DREAM Act works in much the same way. The beneficiaries of the DREAM Act, like parolees, violated a federal law, and would be provided with an opportunity to reintegrate into society through a conditional program as *legal* residents no longer in violation of the law.<sup>310</sup> Therefore, the DREAM Act, in a very general sense, would not make a special exception for undocumented immigrants that the federal government has not also extended to U.S. citizens. Just as employment is often a condition of parole, this comment proposes that it be a condition under the DREAM Act.

Furthermore, by adding an employment requirement, DREAM Act beneficiaries would demonstrate the commitment to excel in both education and in employment. Such achievement will provide added assurance to the opposition that the student will fulfill the intention of the DREAM Act, and not merely take advantage of an easy road to legalized status.

This comment also proposes that all DREAM Act beneficiaries pay taxes in order to address the opposition's argument that the DREAM Act will increase costs to taxpayers and unfairly allow undocumented immigrants to

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306. NICHOLAS N. KITTRIE ET AL., SENTENCING, SANCTIONS, AND CORRECTIONS 950 (2d ed. 2002).

307. *Morrissey v. Brewer*, 408 U.S. 471, 478 (1972).

308. Joan Petersilia, Article, *Parole and Prisoner Reentry in the United States*, 26 CRIME & JUST. 479, 503 (1999).

309. *Morrissey*, 408 U.S. at 478-79.

310. This comment does not intend to draw any analogy between the crimes committed by parolees, and the "crime" technically committed by undocumented immigrants in entering the country illegally. This comparison is mentioned only to demonstrate to the opposition that the federal government has a well-established program of affording those who have broken federal law an opportunity to become assets to society through a conditional program.

benefit from the taxes paid by citizens and legal residents. Today, some illegal immigrants choose to pay taxes, while others do not.

Undocumented immigrants pay the same real estate taxes—whether they own homes or taxes are passed through to rents—and the same sales and other consumption taxes as everyone else . . . . Additionally, the U.S. Social Security Administration has estimated that three quarters of undocumented immigrants pay payroll taxes. . . .<sup>311</sup>

Although U.S. citizens pay taxes through their social security number (SSN), having an SSN is not a prerequisite to doing so. The Internal Revenue Service (IRS) provides Individual Tax Identification Numbers (ITIN) to individuals who do not have an SSN so that they may pay federal taxes.<sup>312</sup> In order to pay income taxes, however, more is needed than simply an ITIN. An individual must actually generate an income that can be taxed. Given this comment's first proposed amendment, which would require DREAM Act beneficiaries to work while receiving their college education, the beneficiaries would therefore generate a taxable income. By paying taxes to the state and federal governments, undocumented immigrants can contribute to the sources that provide in-state tuition benefits and contribute to the funding of federal loans and work study programs, thereby eliminating the fairness and financial issues.

Finally, in addition to mandating employment and the payment of income taxes, this comment proposes that the requirements for permanent legal status be increased to require actual graduation from a college or university, as opposed to only two years towards the completion of a degree. Senator Cornyn suggested that the additional requirement would reinforce the intention of the bill—undocumented immigrants would receive a degree to provide them with

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311. Randy Capps & Michael Fix, *Undocumented Immigrants: Myths and Reality* (Oct. 25, 2005), at [http://www.urban.org/UploadedPDF/900898\\_undocumented\\_immigrants.pdf](http://www.urban.org/UploadedPDF/900898_undocumented_immigrants.pdf).

312. The ITIN “does not entitle you to social security benefits and does not change your immigration status or your right to work in the United States. Also, individuals filing tax returns using an ITIN are not eligible for the earned income credit (EIC).” Internal Revenue Serv. [IRS], Form W-7, Application for IRS Individual Taxpayer Identification Number (Jan. 2007), at 2, *available at* <http://www.irs.gov/pub/irs-pdf/fw7.pdf>.

greater opportunities.<sup>313</sup> In order to provide undocumented students with sufficient time to reach this goal, the conditional period, which is currently set at six years, should be increased to eight years, because two additional years of schooling would be required.

By amending the DREAM Act to require student employment, the payment of taxes, and finally, graduation from college and the attainment of a degree from an institute of higher education, it is this comment's intention that the strong opposition to the DREAM Act will diminish, and that the bill will generate enough support to pass through Congress and be signed into law.

## VI. CONCLUSION

Danny has likely graduated from college, and Diana, if she ever made it, is probably nearing the end of her education. For Danny and Diana, it may be too late, but it is not too late for many others. There are 65,000 undocumented students graduating yearly from high schools in the United States, armed with an education and a lot of potential, but with little opportunity.<sup>314</sup> The Supreme Court recognizes undocumented students' rights to free public schooling through high school, but remains silent on the issue of higher education. Financial aid is unavailable to these students, and in some states, they are forced to pay out-of-state tuition, even though they reside within the state. The federal government does not allow these students to put their primary and secondary education to good use by working legally. The DREAM Act can change the end of their story to one of hope.

Today, the DREAM Act remains in Congress, as it has since 2001.<sup>315</sup> Opposition comes from those who believe the DREAM Act encourages and rewards illegal immigration, provides unfair benefits to people who have broken U. S. law, and presents a financial burden on state and federal governments.<sup>316</sup> Reform is necessary in order to realize the "DREAM" of these hard-working and deserving students.

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313. S. REP. NO. 104-224, at 15 (2004).

314. See Nat'l Immigration Law Ctr., *supra* note 22.

315. See *id.*

316. S. REP. NO. 104-224, at 12-15.

Proponents of the DREAM Act may view this comment's proposed additional requirements as too harsh, and the opposition may see them as still too lenient. Nonetheless, as written, the DREAM Act is just a dream, and a compromise is necessary. In examining the current state and federal laws, and the position of the Supreme Court with regard to undocumented students, it is clear that the DREAM Act is not a radical reform that will dramatically change the way U. S. laws function today; it will not even dramatically affect the lives of all undocumented immigrants currently residing in the country, nor of those who will come in the future. What the DREAM Act will do is work within the bounds of U. S. law and policy to create a way for a group of people who are practically indistinguishable from their legal peers to live the American DREAM.

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